

NO. 44502-6-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

RICHARD KREBS,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR COWLITZ COUNTY

The Honorable Marilyn Haan, Judge

BRIEF OF APPELLANT

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A. ASSIGNMENTS OF ERROR

1. The trial court erred in entering Finding of Fact 3 regarding the defense motion for mistrial. CP 78.

2. The trial court wrongly concluded that the deputy's testimony that appellant "lawyered up" was not a direct comment on appellant's right to silence. CP 78.

3. The trial court wrongly concluded that the deputy's comment was not constitutional error. CP 79.

4. The trial court erred in denying appellant's motion for a mistrial.

5. The deputy's comment on appellant's exercise of his constitutional rights denied appellant due process.

Issue pertaining to assignments of error

The deputy who arrested appellant testified that he advised appellant of his rights, appellant made some statements, and then he "lawyered up." Did this direct comment on appellant's exercise of his right to remain silent violate his right to due process?

B. STATEMENT OF THE CASE

1. Procedural History

On January 13, 2011, the Cowlitz County Prosecuting Attorney charged appellant Richard Krebs with one count of felony hit and run and one count of driving under the influence. CP 1-2; RCW 46.52.020; RCW 46.61.502(1)(b). The State subsequently added one count of reckless driving and two counts of felony harassment. CP 4-6; RCW 46.61.500(1); RCW 9A.46.020. Following a jury trial before the Honorable Marilyn Haan, the jury found Krebs not guilty of hit and run but convicted him of the remaining counts. CP 69-37. The Court imposed standard range sentences, and Krebs filed this timely appeal. CP 80-95.

2. Substantive Facts

On January 10, 2011, Richard Krebs was involved in a one-vehicle rollover accident. RP 205-06. He was taken to the hospital, where he was held for a mental status evaluation, based on his comments and actions at the scene of the accident. RP 37, 46. Deputy Brady Spaulding contacted Krebs at the hospital. He advised Krebs of his rights and told Krebs he wanted to talk about the accident. RP 38-39.

Krebs told Spaulding he had been to Battleground for an appointment, and as he was driving home, some log trucks were tailgating him. Krebs said he tried to get the company name or license plate number

from the log trucks. RP 221. One of the truck drivers had gotten out of his truck when Krebs pulled over, but Krebs said he did not hit anyone. RP 221, 225. Krebs told Spaulding that one of the log trucks ran him off the road, and he rolled his vehicle. RP 225.

Spaulding then asked Krebs how much he had had to drink. RP 225. First Krebs said he had had 14 drinks, then he said he had not had even one. RP 225. When Spaulding said it was obvious Krebs had been drinking, Krebs admitted drinking half a beer as he was driving home. RP 225-26. Spaulding read Krebs the implied consent warnings for blood alcohol content testing, and Krebs declined to give a blood sample. RP 226. Krebs was charged with hit and run, driving under the influence, reckless driving, and two counts of felony harassment based on the incidents leading up to and immediately following the accident.

At trial, Ken Sellers testified that he was driving his log truck on a two-lane highway when he passed Krebs's vehicle, a small Honda SUV. RP 66, 70. Krebs then pulled up behind Sellers, and, thinking his truck may have kicked up a rock that struck Krebs's vehicle, Sellers pulled over. RP 72, 74-76. Sellers testified that after he got out of his truck, Krebs drove his car at him, and his hand hit Krebs's mirror as he passed. RP 78. Krebs stopped his vehicle, Sellers walked over and spoke to him, and Krebs then drove away. RP 79, 81, 88. The State charged Krebs with

felony hit and run based on Sellers's allegations, but the jury found him not guilty. CP 4, 69.

Sellers also testified that after he got back in his truck and started driving, Krebs drove his vehicle towards Sellers's truck in Sellers's lane of travel, turning away at the last second. RP 90-92. As Sellers was driving to report this incident, Krebs drove at Sellers a second time, again turning away at the last second. RP 95. On his way back to his jobsite after calling the Highway Patrol, Sellers saw Krebs's vehicle overturned on the side of the road. RP 98, 101.

James Barton testified that he was driving his log truck that day when he saw Sellers pass, and Sellers told him over the CB radio what had happened. RP 124-25. Barton then saw Krebs driving toward him. Krebs made a U-turn and pulled behind the car that was behind Barton. Barton felt Krebs was driving erratically, crossing over the double yellow lines at times, trying to catch up to him. RP 127. Barton testified that other cars in the oncoming lane had to pull onto the shoulder to avoid colliding with Krebs. RP 129. When Barton pulled his truck onto the logging spur, Krebs stopped and glared at him, then drove off behind another log truck. RP 132-35.

Robert McEldoon is a volunteer firefighter and EMT who also works for a logging company. RP 140, 143. He was at work on the day in

question when he heard over the CB radio that a Honda SUV had rolled off the road. McEldoon and his supervisor, Scott Keatley, went to the scene of the accident to assist. RP 143, 165. They saw the vehicle up against a tree on its passenger side, with Krebs dangling by the seatbelt in the driver's seat. RP 144, 165.

McEldoon testified that he spoke to Krebs while Keatley held the driver's door partway open using a pipe. RP 145. An odor of consumed alcohol was coming from Krebs. RP 145-46, 166. Krebs was slow in responding when McEldoon asked to examine him, but when he spoke, his speech was not slurred. RP 147. Krebs was struggling to get out of his seatbelt, so McEldoon offered to cut him out. When he did so, Krebs fell to the passenger side of the vehicle. RP 148. After he fell, Krebs had some difficulty locating the ignition and removing the key as McEldoon instructed, but he was eventually able to do so. RP 148-51.

McEldoon and Keatley testified that throughout their encounter, Krebs kept repeating that he wanted to die. RP 151, 168. McEldoon was able to calm Krebs down for a time, but then he became upset again. RP 151. Both men testified that, after they had talked for a while, Krebs told them to get away from the vehicle because he was going to kill them. RP 153, 169-70. McEldoon moved away from the vehicle and waited for law enforcement to arrive. RP 154-55. Keatley saw Krebs reach into his

pocket and became nervous. According to Keatley, Krebs had said earlier in the encounter that he had a grenade. RP 179. Keatley asked Krebs to put his head down, and he removed the pipe that was holding the driver's door open. He then walked to the road as well. RP 170.

When law enforcement arrived, Krebs was removed from the vehicle and transported to the hospital. RP 186, 188, 194, 217. Krebs was unresponsive when deputies first approached his vehicle, and an odor of alcohol was present. RP 209-10. Once Krebs was removed from the vehicle, the deputies had to assist him up the hill to the ambulance. RP 198. At the hospital, Krebs was unable to walk without bracing himself against walls and counters for support. RP 218-19. Deputy Spaulding testified that Krebs was exhibiting signs of intoxication, but he admitted on cross examination that Krebs's condition could have been the result of the motor vehicle accident. RP 220, 257.

Deputy Spaulding testified that after talking to Krebs about the accident and about how much he had had to drink, he concluded that Krebs was under the influence of alcohol. RP 226. When Spaulding testified that he read Krebs the implied consent warnings for blood testing, the prosecutor asked, "So you did not get blood from him?" RP 226.

Spaulding responded, "I did not. He refused. He lawyered up at that point." RP 226. Defense counsel objected to this testimony, and the

court sustained the objection, instructing the jury to disregard the deputy's last statement. RP 226-27.

The jury was excused from the courtroom, and defense counsel moved for a mistrial. RP 227. Counsel argued that the testimony that Krebs "lawyered up" was an unconstitutional comment on Krebs's rights to remain silent and to an attorney. RP 227, 229, 238. The court denied the motion for mistrial. It found that Spaulding's testimony was related to Krebs's refusal to provide a blood sample, which is admissible evidence. It concluded that the testimony was only an indirect comment on Krebs's right to remain silent and that the curative instruction was sufficient to remove any prejudice. RP 241-42. The court entered written findings of fact and conclusions of law to support its ruling. CP 77-79.

C. ARGUMENT

THE DEPUTY'S COMMENT ON KREBS'S EXERCISE OF HIS CONSTITUTIONAL RIGHTS VIOLATED HIS RIGHT TO DUE PROCESS, AND HIS CONVICTIONS MUST BE REVERSED.

The Fifth Amendment to the United States Constitution guarantees that a criminal defendant shall not be compelled to be a witness against himself. U.S. Const. amend V. Nor may the State comment on a defendant's exercise of that right. Griffin v. California, 380 U.S. 609, 613-15, 14 L.Ed.2d 106, 85 S.Ct. 1229 (1965). The Washington Constitution guarantees the same protections. Wash. Const., art. I, § 9;

State v. Earls, 116 Wn.2d 364, 374-74, 805 P.2d 211 (1991) (federal and state protections coextensive).

“The right against self-incrimination is liberally construed. It is intended to prohibit the inquisitorial method of investigation in which the accused is forced to disclose the contents of his mind, or speak his guilt.” State v. Easter, 130 Wn.2d 228, 236, 922 P.2d 1285 (1996) (citations omitted). Thus, it is constitutional error for the State to elicit testimony or make closing argument as to the defendant’s silence to infer guilt. Easter, 130 Wn.2d at 236. Further, it is well settled that comments on the defendant’s post-arrest silence violate due process, because the Miranda warnings constitute an assurance that the defendant’s silence will carry no penalty. Easter, 130 Wn.2d at 236; State v. Romero, 113 Wn. App. 779, 786-87, 54 P.3d 1255 (2002) (citing Doyle v. Ohio, 426 U.S. 610, 619, 96 S.Ct. 2240, 49 L.Ed.2d 91 (1976)); State v. Fricks, 91 Wn.2d 391, 395-96, 588 P.2d 1328 (1979).

“It is a violation of the defendant’s right to silence for a police officer to testify that the defendant refused to talk to him or her.” Romero, 113 Wn. App. at 787 (citing Easter, 130 Wn.2d at 241). A remark that does not directly comment on the defendant’s exercise of his rights, however, is not reversible absent a showing of prejudice. State v. Burke,

163 Wn.2d 204, 181 P.3d 1 (2008); Romero, 113 Wn. App. at 787 (citing State v. Lewis, 130 Wn.2d 700, 705-07, 927 P.2d 235 (1996)).

In Lewis, an officer testified that he told the defendant “that if he was innocent he should just come in and talk to me about it.” Lewis, 130 Wn.2d at 703. The Supreme Court held that the officer's statement did not constitute an improper comment and instead was a mere reference to the defendant’s exercise of his right to remain silent. Id. at 705–06.

In Romero, by contrast, the arresting officer testified that the defendant was somewhat uncooperative and that, “I read him his Miranda warnings, which he chose not to waive, would not talk to me.” Romero, 113 Wn. App. at 785. The Court of Appeals held this was an impermissible direct comment on the defendant’s exercise of his constitutional rights. Romero, 113 Wn. App. at 793. See also Easter, 130 Wn.2d at 233 (officer’s testimony characterizing defendant as a “smart drunk” because he refused to answer questions at accident scene was direct comment); State v. Curtis, 110 Wn. App. 6, 9, 13-16, 37 P.3d 1274 (2002) (conviction reversed where officer testified that he read defendant Miranda rights and defendant refused to talk to him); State v. Nemitz, 105 Wn. App. 205, 213-15, 19 P.3d 480 (2001) (reversible error for testifying officer to describe attorney’s business card defendant had given him, which explained the holder’s rights if stopped by law enforcement).

Here, just like in Romero, Spaulding directly commented on Krebs's exercise of his constitutional rights. Spaulding testified that he read Krebs his rights and Krebs said he understood them. RP 220. Spaulding further testified that after speaking for a while and being asked to provide a blood sample, Krebs "lawyered up." RP 226. The term "lawyered up" clearly refers to a refusal to cooperate with the police investigation by exercising the right not to answer questions without an attorney present.

A direct comment on the defendant's exercise of rights is constitutional error. Romero, 113 Wn. App. at 790. When a comment from a State agent is indirect, it is still constitutional error if it was given for the purpose of attempting to prejudice the defense or resulted in the unintended effect of likely prejudice. Id. at 790-91. Under both scenarios, the reviewing court must apply the constitutional harmless error analysis. Id.

The court below found that Spaulding's testimony was related to Krebs's refusal to provide a blood sample, and it concluded that the testimony was an indirect comment on Krebs's right to silence and a non-constitutional error. CP 78-79. The record does not support the court's rulings.

It is true that the prosecutor asked whether Krebs refused to provide a blood sample after being read his implied consent warnings. RP 226. Once an accused is arrested for driving under the influence, a refusal to take a BAC test is admissible in a criminal trial. RCW 46.20.308(2)(b). While the prosecutor's question called for admissible evidence, Spaulding did not leave it at that. He not only testified that Krebs refused to provide a blood sample, but he went on to testify that Krebs "lawyered up at that point." RP 226. Thus, the court's finding that the testimony referred only to the refusal to provide a blood sample is not supported by the evidence.

Moreover, the fact that Spaulding's comment was not responsive to the prosecutor's question does not render the error non-constitutional, as the trial court concluded. Even though it was unresponsive and volunteered, Spaulding's comment indicated an attempt to denigrate Krebs and prejudice the defense by inferring that his lack of cooperation was more consistent with guilt than with innocence. Thus, whether classified as a direct or indirect comment, the error is constitutional. See Romero, 113 Wn. App. at 793 (officer's unresponsive and volunteered comment that defendant decided not to waive his rights, whether direct or indirect, was constitutional error).

A reviewing court will find "a constitutional error harmless only if convinced beyond a reasonable doubt any reasonable jury would reach the

same result absent the error” and “where the untainted evidence is so overwhelming it necessarily leads to a finding of guilt.” Easter, 130 Wn.2d at 242. Constitutional error is presumed prejudicial, and the State bears the burden of proving it was harmless. State v. Guloy, 104 Wn.2d 412, 425, 705 P.2d 1182 (1985), cert. denied, 475 U.S. 1020 (1986).

The State cannot meet that burden in this case. While this Court can consider the fact that the trial court instructed the jury to disregard Spaulding’s improper comment, reversal is still required unless that instruction rendered the error harmless beyond a reasonable doubt. See Romero, 113 Wn. App. at 791.

It is unlikely the jury was able to disregard the deputy’s comment as instructed. A comment on the defendant’s invocation of his right to remain silent implies the defendant’s guilt. While that implication seems logical and compelling, silence is actually ambiguous. There are many reasons a defendant might choose to remain silent, not the least of which is that he has that right. In most cases it is impossible to conclude that a refusal to speak is more consistent with guilt than with innocence, and the danger exists that such refusal will be misinterpreted by the jury. For this reason, curative instructions regarding comments on the defendant’s silence are of questionable value. State v. Gauthier, ___ Wn. App. ___,

298 P.3d 126, 130-31 (2013) (citing United States v. Prescott, 581 F.2d 1343 (9th Cir.1978)).

As trial counsel argued, the State's evidence left considerable room for doubt regarding the charged offenses. The State attempted to simultaneously present Krebs as capable of maneuvering at a high rate of speed on a winding road to narrowly avoid collisions, and at the same time so intoxicated that he could not stand upright. While there was evidence which could be attributed to intoxication, there was also evidence that Krebs's condition could have been the result of the rollover accident. Moreover, there was a substantial question whether Krebs's comments to McEldoon and Keatley could reasonably cause fear under the circumstances. See RP 291-304.

Spaulding's comment on Krebs's silence bolstered the State's case on all counts. Not only did it suggest to the jury that Krebs would not have refused to continue their conversation if he was innocent, but his portrayal of Krebs as uncooperative encouraged the jury to infer that Krebs was the type of person who would knowingly threaten responders who were trying to assist him. Under the circumstances, the improper comment on Krebs's constitutional rights cannot be deemed harmless beyond a reasonable doubt, and he is entitled to a new trial.

D. CONCLUSION

The deputy's testimony that Krebs "lawyered up" after being informed of his rights violated Krebs's right to due process, and his convictions must be reversed. This Court should remand for a new trial.

DATED July 11, 2013.

Respectfully submitted,



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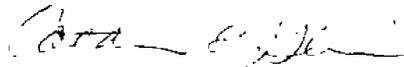
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Krebs, Cause No. 44502-6-II as follows:

Richard Krebs
23600 NE Morning Drive
Yacolt, WA 98675

I certify under penalty of perjury of the laws of the State of Washington
that the foregoing is true and correct.



Catherine E. Glinski
Done in Port Orchard, WA
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